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No. 88-1791

In The

# Supreme Court of the United States

October Term, 1988

JANET D. VAUGHN and RICHARD L. VAUGHN,

*Petitioners,*

vs.

ADELINE SPEAKER and JANET E. PRESCOTT, Co-Executors of the Estate of WILBUR P. SPEAKER,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois**

## BRIEF IN OPPOSITION

ROBERT J. NOE, Of Counsel
BOZEMAN, NEIGHBOUR, PATTON & NOE
Fifth Avenue Building
1630 Fifth Avenue
P. O. Box 659
Moline, IL 61265
Telephone: (309) 797-0850

*Attorneys for Respondents, Adeline Speaker and Janet E. Prescott, Co-Executors of the Estate of Wilbur P. Speaker*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether there is sufficient state involvement in the running of a general statute of limitations to implicate the due process clause of the United States Constitution.

2. Whether the invoking of a statute of limitations defense by a private party rises to the level of state action.

3. Whether this Court should exercise its jurisdiction to review a state law matter which has been resolved by the highest court of that state.

## LIST OF ALL PARTIES TO PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case.

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## STATUTES INVOLVED

In addition to the state statutes set forth in the Petition for Writ of Certiorari, this case involves the following statutes:

Illinois Revised Statutes, Ch. 110, § 13-202:

"Actions for damages for an injury to the person . . . should be commenced within 2 years next after the cause of action occurred"

Illinois Revised Statutes, Ch. 110, § 13-203:

"Actions for damages for loss of consortium or other actions deriving from injury to the person of another . . . shall be commenced within the same period of time as actions for damages for injury to such other person."

## REASONS FOR DENYING THE WRIT

### I.

### STATEMENT OF CASE

On December 2, 1983 automobiles operated by Janet Vaughn and Wilbur P. Speaker collided. Mrs. Vaughn claimed that she was injured and retained counsel. Mr. Speaker died on January 16, 1985, a fact which was unknown to his insurance representative. Plaintiff's counsel also claims that he was unaware of the death. The death certificate was a matter of public record.

Some discussions took place between plaintiffs' attorney and a representative of Iowa Mutual Insurance Company, the carrier which issued a policy covering the Speaker vehicle at the time of the subject collision. The

last such contact was on July 29, 1985, more than four months before expiration of the two-year statute of limitations provided by Illinois law for the filing of a personal injury action.

For some reason, the attorney representing the plaintiffs waited until five days before the limitations period expired to file suit against Mr. Speaker. The action sought damages for personal injuries and loss of consortium on behalf of Mrs. Vaughn and her husband respectively. The summons was returned indicating the death of the decedent. On December 23, 1985, plaintiffs' counsel obtained entry of an *ex parte* Order granting a Motion to Correct Misnomer. He then named Adeline Speaker and Janet E. Prescott, Co-Executors of the Estate of Wilbur Speaker, as defendants. Thus they were first sued 21 days after the statute of limitations had expired.

A week later, on December 30, 1985, plaintiffs' counsel called the insurance company and attempted to reopen negotiations. In the course of that conversation, he advised the carrier that Mr. Speaker had died.

A Motion to Dismiss based on the statute of limitations was filed on behalf of the defendants. This motion was allowed by the trial court. Respondent's Appendix, pp. App. 1-3; Petition for Writ of Certiorari, Appendix, pp. 1-2. The plaintiffs appealed and the Illinois Appellate Court, Third District, affirmed the ruling of the trial judge that the attempted filing prior to the end of the limitations period was a nullity because a dead person is a non-entity for purposes of litigation and that the action was barred by the statute of limitations. No statute exists in Illinois allowing this type of untimely-filed action to

relate back prior to the expiration of the limitation period. However, the case was remanded for a determination of whether or not the defendants were estopped to raise this defense due to the conduct of the insurer. This ruling, as to both limitations and estoppel, was affirmed by the Illinois Supreme Court. Petitions for Rehearing were filed by both sides. Despite the fact that *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 565 (1988), had been decided over one month prior to oral arguments, the Petition for Rehearing filed on behalf of the plaintiffs was the first time the constitutional argument was raised. Both Petitions for Rehearing were denied.

Thus, the decision of the Illinois Supreme Court did not pertain to the limitation imposed by the Probate Act, but to the use of the statute of limitations by private parties and further interpreted Illinois statutes pertaining to means of relating back untimely-filed actions. Additionally, the decision of the Illinois Supreme Court is not final because the case has been remanded to the trial court for further proceedings.

## II

## SUMMARY OF ARGUMENT

In Illinois, a claimant is entitled to the full period afforded by the applicable statute of limitations to initiate an action against a decedent who is insured. Such a claimant is not limited to the shorter claim period provided by the Probate Act. Accordingly, this case involves the private use of a self-executing statute of limitations.

The Fourteenth Amendment affords due process protection against loss of property rights only if the deprivation is by state action. The state's involvement in the running of a general statute of limitations is not sufficient to implicate due process. This case, contrary to the claims of the plaintiffs, is one involving state law questions and does not warrant the involvement of this Court.

## III

## ARGUMENT

### A.

### THE ILLINOIS SUPREME COURT DETERMINED THAT SUIT WAS NOT FILED PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS PERTAINING TO PERSONAL INJURY ACTIONS. THE DEFENDANTS' PRIVATE USE OF THE LIMITATIONS DEFENSE DOES NOT INVOLVE SUFFICIENT STATE ACTION TO IMPLICATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The record is undisputed that Wilbur Speaker was insured on the date of the automobile accident giving rise to this personal injury action. For this reason, under Illinois law, the plaintiffs had the entire two years permitted by the general statute of limitations pertaining to personal injury actions to file their suit. They were not required to do so within the Probate Act claim period.

The plaintiffs attempt to create a constitutional question by relying on this Court's decision in *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed 2d 565 (1988), which pertained to the adequacy of notice to creditors under a probate statute. In that case, a collection agency failed to file a claim within

the two-month period prescribed by the Oklahoma probate statute. This Court held that due process guarantees prohibit a probate statute from dispensing with actual notice to creditors who are reasonably ascertainable and that, in the absence of such notice, a claim can be filed.

The plaintiffs in the instant case go so far as to claim that the Illinois Supreme Court "ruled that appellant's claim was time barred under the provisions of Ill.Rev.Stat. Ch. 110½, § 13-209."[1] Petition for Writ of Certiorari, pp. 25-26. This is obviously an effort to create a constitutional issue in this case.

Upon analysis, it is obvious this contention is meritless. The decision of the Illinois Supreme Court turned on the plaintiffs' failure to comply with the statute of limitations (Ill.Rev.Stat. Ch. 110, §§ 13-202, 13-203), not the fact that they did not file within the probate claim period. The court noted:

> "We first address the issue of whether the complaint against the executors was timely filed. In order for us to find that the second complaint was timely filed, we must find that it related back to the date on which the first complaint was filed. The statute of limitations for personal injuries generally governing actions for personal injuries, set forth in Section 13-202 of the Code of Civil Procedure (Code) (Ill.Rev.Stat. 1987, Ch. 110, par. 13-202), is two years, and the second complaint was filed over two years from the date of injury."

---

[1] There is no such section in the Illinois Revised Statutes. Apparently this is an attempt at citing Illinois Revised Statutes, Ch. 110½, § 18-12, which establishes a six-month deadline for filing claims under the Probate Act.

*Vaughn* v. *Speaker*, 126 Ill. 150, 533 N.E.2d 885, 127 Ill.Dec. 803, 805.

The court's further discussion concerning the probate claim period is nothing more than dicta expressed in response to the attempt by the plaintiffs to find a statute which could be utilized to salvage their untimely-filed action. The court simply pointed out that none of the cited statutes could be interpreted so as to extend the limitations period.

In Illinois, claims against decedents who are insured can be asserted at any time prior to the expiration of the applicable statute of limitations. *Schloegel* v. *Nardi*, 92 Ill.App.2d 302, 234 N.E.2d 558 (4th Dist. 1968).

Since the record shows that Mr. Speaker was insured by Iowa Mutual Insurance Company at the time of the subject accident, Mr. and Mrs. Vaughn had two years to file their personal injury suit as opposed to being required to do so within the six-month Illinois probate claim period. The defendants have never asserted failure to comply with the probate claim period precludes this action.

The Fourteenth Amendment affords protection against loss of property interests only if the deprivation is via state action. Thus due process considerations are not involved when private parties, such as the defendants in this case, invoke a defense based on a self-executing statute of limitations. This Court has stated:

> "The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state sanctioned private remedies or procedures does not rise to the level of state action.

> See, *e.g. Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Nor is the State's involvement in the mere running of a general statute of limitation generally sufficient to implicate due process. See *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed. 2d 738 (1982). See also *Flagg Bros., Inc. v. Brooks, supra* 436 U.S., at 166, 98 S.Ct. at 1738. . . ."

*Tulsa Professional Collection Services* v. *Pope*, 108 S.Ct. at 1345.

*Tulsa* illustrates the difference between the bar of a claim arising under a probate non-claim statute and a statute of limitations, *i.e.* the intimate involvement of the probate court in the former, including the appointment of the personal representative and the filing of the publication notice with the court. In rejecting the argument that probate claim deadlines and statutes of limitations were equivalent for due process purposes, this Court pointed out:

> "It is true that nonclaim statues generally possess some attributes of statutes of limitations. They provide a specific time period within which particular types of claims must be filed and they bar claims presented after expiration of that deadline. . . .
>
> "As we noted in *Short*, however, it is the "self-executing feature" of a statute of limitations that makes *Mullane* and *Mennonite* inapposite. See 454 U.S., at 533, 536, 102 S.Ct., at 794, 796. The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required

> to implicate the protections of the Due Process Clause."

*Tulsa Professional Collection Services* v. *Pope*, 108 S.Ct. at 1345.

Although they did not mention it, the instant plaintiffs are asking this Court to overrule *Texaco, Inc.* v. *Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed. 2d 738 (1982), wherein the constitutionality of an Indiana statute barring certain claims to mineral interests which had not been used for 20 years was upheld against a due process challenge. In rejecting the argument that the absence of specific notice to them prior to the lapse of a mineral right rendered the self-executory feature of the Indiana statute ineffective, this court noted:

> "That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional."

*Texaco, Inc.* v. *Short*, 102 S.Ct. at 796.

The fact that the Illinois courts are cognizant of this Court's directive as set forth in *Tulsa Professional Collection Services* and that due process considerations are applicable only in situations involving state action is demonstrated by the case cited by the plaintiffs in their Supplemental Brief herein. An Illinois Appellate Court, dealing with the question of whether a claim was barred because of failure to comply with the probate act claim period, not the statute of limitations, discussed *Tulsa* as follows:

> "In reaching its conclusion, the *Tulsa* Court reasoned that a creditor's claim is considered a property interest protectible by the Due Process Clause, and that the probate court's intimate involvement throughout

the probate proceedings is so pervasive that it must be considered State action."

*Rose* v. *Kaszynski*, 178 Ill.App.3d 266, 533 N.E.2d 73, 127 Ill.Dec. 455, 457 (1st Dist. 1988).

The result desired by the plaintiffs in this case would result in a substantial, and unwarranted, expansion of the state action concept and thus the Petition for Writ of Certiorari herein should be denied.

B.

**THE RULING OF THE ILLINOIS SUPREME COURT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND. THIS COURT HAS STATED THAT IT IS BOUND TO ACCEPT SUCH AN INTERPRETATION OF STATE LAW.**

As noted above, *Tulsa Professional Collection Services* and other cases pertaining to the type notice which is given to creditors under probate statutes or laws where the required state action results from judicial involvement in the proceedings are not applicable. Instead of a due process determination, this Court is being asked to review state law matters, being the statute of limitations, whether or not filing a purported suit against a dead man tolls its operation and various statutes pertaining to the relating back of untimely-filed actions.

The ruling of the Illinois Supreme Court which petitioners seek to have reviewed rests on an independent and adequate state ground. When this is the case, a Petition for Writ of Certiorari should be denied. *Wilson* v. *Loew's, Inc.*, 355 U.S. 597, 78 S.Ct. 526 (1958); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct.

2849 (1977). Further, denial of the writ would be in conformance with this Court's holding that it is bound to accept interpretation of state law by the highest court in the state in question. *Coleman* v. *Alabama*, 399 U.S. 1, 90 S.Ct. 1999 (1970).

Whether the statute of limitations should be longer for personal injury claims or whether there should be a procedure for relating back an action against a decedent which is filed prior to the expiration of the limitations period after it expires are matters for the duly elected legislature in Illinois to determine. There are obviously many valid reasons why a statute of limitations should not be undermined simply because of claimed lack of knowledge. But such considerations are immaterial at this stage of the proceeding because, in the absence of a constitution deprivation resulting from state action, it has been held that this Court cannot overturn state legislation. Thus, in *Labine* v. *Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971), rehearing denied 402 U.S. 990, a Louisiana intestate succession statute which precluded illegitimate children, even if they were acknowledged, was held to be a choice which was within the power of the state to make and thus not in contravention of the equal protection and due process clauses.

The fact that this case is one which involves matters appropriately resolved at the state level is another reason that the plaintiffs' Petition for Writ of Certiorari should be denied.

## CONCLUSION

Contrary to the argument of the plaintiffs, this case involves private utilization of a self-executing statute of limitations, not claims which were barred by a probate statute. Accordingly, there has been no deprivation of property interests via state action and therefore federal due process considerations are not involved. This personal injury case involves questions of state law which are appropriately dealt with at that level. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. NOE
*Attorney for Adeline Speaker and Janet E. Prescott, Co-Executors of the Estate of Wilbur D. Speaker, Deceased, Defendants*

ROBERT J. NOE, Of Counsel
BOZEMAN, NEIGHBOUR, PATTON & NOE
Fifth Avenue Building
1630 Fifth Avenue
P. O. Box 659
Moline, Illinois 61265
Telephone: 309/797-0850

# APPENDIX

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT WHITESIDE COUNTY, ILLINOIS GENERAL DIVISION

| | | |
|---|---|---|
| JANET D. VAUGHN and RICHARD L. VAUGHN, Plaintiffs, | ) | No. 85 L 559 |
| vs. | ) | |
| ADELINE SPEAKER and JANET E. PRESCOTT, Co-Executors of the Estate of Wilbur P. Speaker, Defendants. | ) | |

*MOTION TO DISMISS*

NOW COMES Adeline Speaker, Co-Executor of the Estate of Wilbur P. Speaker, deceased, defendant, by Bozeman, Neighbour, Patton & Noe, her attorneys, and moves the court, pursuant to Section 2-619 of the Code of Civil Procedure (Ill.Rev.Stat. Ch. 110, §2-619) to dismiss the Complaint herein and in support of said motion states:

1. That it is apparent from the records of this case that this action was not filed within the time permitted by law, i.e. December 2, 1985. Illinois Revised Statutes, Ch. 110 §§ 13-202, 13-203.

2. That the first time this defendant was named was on December 23, 1985 via what was entitled Motion to Correct Misnomer of Defendant. In fact, there was no misnomer since the purported action filed on November 22, 1985 against Wilbur P. Speaker was a nullity in that the said Wilbur P. Speaker was deceased, having died on

January 16, 1985. A certified copy of the Medical Certificate of Death is attached hereto.

ADELINE SPEAKER, Co-Executor
of the Estate of Wilbur P. Speaker,
deceased, Defendant,

By /s/ Robert J. Noe
For: Bozemen, Neighbour, Patton & Noe Her Attorneys

Robert J. Noe, Of Counsel
BOZEMAN, NEIGHBOUR, PATTON & NOE
Fifth Avenue Building
1630 Fifth Avenue
P. O. Box 659
Moline, Illinois 61265
Telephone: (309) 797-0850

*COPY OF DEATH CERTIFICATE OMITTED IN PRINTING.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT WHITESIDE COUNTY, ILLINOIS GENERAL DIVISION

| | | |
|---|---|---|
| JANET D. VAUGHN and RICHARD L. VAUGHN, | ) | |
| Plaintiffs, | ) | No. 85 L 559 |
| vs. | ) | |
| ADELINE SPEAKER and JANET E. PRESCOTT, Co-Executors of the Estate of Wilbur P. Speaker, | ) | |
| Defendants. | ) | |

*O R D E R*

The above cause coming on for hearing on the Motion to Dismiss filed by the defendants and the court having considered argument of counsel and briefs submitted by both parties and being fully advised,

It is hereby ORDERED that said motion is allowed and Complaint is dismissed with prejudice. Defendants are awarded costs.

Entered this 2nd day of April, 1986.

/s/ Robert W. Castendyck
Judge